

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MOTORISTS MUTUAL INSURANCE)	
COMPANY, as subrogee of Thomas)	
Kalkhof and T.E. Kalkhof Realty Company,)	
Plaintiff)	
)	
v.)	CIVIL ACTION NO. 05-140E
)	
LINDA BEBKO-JONES,)	
Defendant)	ELECTRONICALLY FILED

**ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S COMPLAINT**

Defendant LINDA BEBKO-JONES, by her attorneys MacDonald, Illig, Jones & Britton LLP, files the following Answer and Affirmative Defenses to Plaintiff's Complaint:

THE PARTIES

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.

JURISDICTION AND VENUE

4. The allegations in Paragraph 4 constitute conclusions of law to which no answer is required.

5. The allegations in Paragraph 5 constitute conclusions of law to which no answer is required.

GENERAL ALLEGATIONS

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted.

9. Paragraph 9 is admitted.

10. Paragraph 10 is denied in that after reasonable investigation, defendant is without sufficient knowledge or information sufficient to form a belief as to the truth of the averments, and strict proof is demanded at time of trial.

11. The allegations contained in Paragraph 11 of Plaintiff's Complaint constitute conclusions of law to which no answer is necessary.

ANSWER TO COUNT ONE

12. Defendant incorporates Paragraphs 1 through 11 above.

13. Denied as a conclusion of law.

14. Denied. To the contrary, it was defendant's habit to dispose of her smoking materials by washing out the ashtray and by properly disposing of the cigarette by discarding it in a waste can.

15. Denied that this defendant was negligent and/or careless in any way.

16. Denied that this defendant was negligent in any way. By way of further answer:

- a. it is denied that defendant failed to exercise reasonable care when smoking in her office; to the contrary, it was defendant's habit to properly extinguish and dispose of all smoking materials.
- b. it is denied that defendant failed to exercise reasonable care when discarding smoking materials; to the contrary, defendant used reasonable care when doing so, by making sure that all lit cigarettes were extinguished and placed in a proper trash receptacle.
- c. it is denied that defendant failed to extinguish smoking materials before discarding them into a trashcan; the defendant properly extinguished all such smoking materials.
- d. it is denied that defendant otherwise failed to use due care under the circumstances; to the contrary, defendant used adequate care at all times.

WHEREFORE, defendant Linda Bebko-Jones requests that judgment be entered in her favor and against plaintiff MOTORISTS MUTUAL INSURANCE COMPANY with respect to all claims set forth in Plaintiff's Complaint.

FIRST AFFIRMATIVE DEFENSE

17. Defendant incorporates Paragraphs 1 through 16 above as set forth in full.
18. Plaintiff has failed to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSES

19. Defendant incorporates Paragraphs 1 through 18 above as set forth in full.
20. The fire at the subject premises started by the act or omission of an agent and/or employee of Thomas Kalkhof and/or T. E. Kalkhof Realty Company.

THIRD AFFIRMATIVE DEFENSE

21. Defendant incorporates Paragraphs 1 through 20 above as set forth in full.
22. Plaintiff has failed to preserve evidence from the fire scene and has caused severe prejudice to the defendant's ability to defend this case.

FOURTH AFFIRMATIVE DEFENSE

23. Defendant incorporates Paragraphs 1 through 22 above as set forth in full.
24. Plaintiff has failed to mitigate its alleged damages in accordance with the law, which failure bars and/or substantially diminishes any claim for damages.

FIFTH AFFIRMATIVE DEFENSE

25. Defendant incorporates Paragraphs 1 through 24 above as set forth in full.

26. The subject matter which forms the basis for this lawsuit is currently pending in an action filed at Docket No. 2004-1129 before the Honorable William R. Cunningham in the Court of Common Pleas for Erie County, Pennsylvania. (The Docket Entries in the state court action are attached hereto as Exhibit "A").

27. As a result, some or all of Plaintiff's claims are precluded by the affirmative defenses of res judicata and collateral estoppel and/or claim and issue preclusion.

WHEREFORE, defendant Linda Bebko-Jones requests that judgment be entered in her favor and against plaintiff MOTORISTS MUTUAL INSURANCE COMPANY with respect to all claims set forth in Plaintiff's Complaint.

A JURY TRIAL IS HEREBY DEMANDED

Respectfully submitted,

s/ Dale Huntley

Dale Huntley

PA Bar ID No. 37556

Walter E. "Stormy" Deacon III

PA Bar ID No. 82961

MacDONALD, ILLIG, JONES & BRITTON LLP

100 State Street, Suite 700

Erie, Pennsylvania 16507-1459

(814) 870-7600

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dhuntley@mijb.com

wdeacon@mijb.com

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Erie County Prothonotary
Civil Case Inquiry Screen

2004-11229 T.E. KALKHOF REALTY CO (vs) LINDA BEBKO-JONES, AL

4/06/2004
10:59

Reference No.:

Filed Date....:

Case Type.....: COMPLAINT

Filed Time.....:

Judgement.....:

Execution Date:

Judge Assigned: CUNNINGHAM WILLIAM R

Jury Trial?....:

Disposed Desc.:

Disposition Dt:

----- Case Comments -----

Higher Court 1:

Higher Court 2:

GENERAL

Enter will Display the Docket Entries

KALKHOF T E REALTY CO

PLAINTIFF

BEBKO-JONES LINDA

DEFENDANT

PENNSYLVANIA COMM OF

DEFENDANT

JUDGEMENTS

NO JUDGEMENT ENTRIES ON FILE

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EXHIBIT
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4/06/2004

Time: 10:59 **Case Type:** COMPLAINT**Search Date:****Page** **of** **14**----- **FIRST ENTRY** -----

4/06/04 CAPTION: T.E. KALKHOF REALTY COMPANY VS. LINDA BEBKO-JONES, INDIVIDUALLY, AND IN HER CAPACITY AS STATE REPRESENTATIVE OF THE 1ST LEGISLATIVE DISTRICT OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE COMMONWEALTH OF PENNSYLVANIA

4/06/04 COMPLAINT CIVIL ACTION, COUNT I-IN THE AMOUNT OF \$10,500.00; COUNTS II & IV IN AN AMOUNT IN EXCESS OF \$30,000.00. NOTICE TO PLEAD WITHIN TWENTY (20) DAYS. F/PAUL F BURROUGHS ESQ.

025 Image page(s) exist(s) for this entry

4/06/04 CONTRACT.

4/12/04 ACCEPTANCE OF SERVICE OF COMPLAINT ON BEHALF OF DFDNTS, LINDA BEBKO-JONES, AND IN HER CAPACITY AS STATE REPRESENTATIVE DTD 4/9/04. F/DEANNA LYNN SARACCO, ESQ.

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- 001 Image page(s) exist(s) for this entry
- 4/26/04 DEFT'S ANSWER, AFFIRMATIVE DEFENSES NEW MATTER AND COUNTERCLAIM F/ DEANNA LYNN SARACCO ESQ. W/CERT OF SERVICE.
- 023 Image page(s) exist(s) for this entry
- 5/24/04 PRELIMINARY OBJECTIONS TO DEFT'S ANSWER AFFIRMATIVE DEFENSES NEW MATTER AND COUNTERCLAIMS F/PAUL F BURROUGHS ESQ. W/CERT OF SERVICE.
- 007 Image page(s) exist(s) for this entry
- 5/24/04 PLFF T.E. KALKHOF REALTY COMPANY'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO DEFT'S ANSWER AFFIRMATIVE DEFENSES NEW MATTER AND COUNTERCLAIMS F/PAUL F BURROUGHS ESQ. W/CERT OF SERVICE.
- 008 Image page(s) exist(s) for this entry
- 6/08/04 DEFTS AMENDED NEW MATTER AND COUNTERCLAIMS F/DEANNA LYNN SARACCO

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034 Image page(s) exist(s) for this entry

6/28/04

NOTICE OF SERVICE OF ANSWERS TO INTERROGATORIES AND RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS ON 6/28/04 TO DEANNA LYNN SARACCO, ESQ. W/CERT OF SERVICE. F/PAUL BURROUGHS, ESQ.

002 Image page(s) exist(s) for this entry

7/09/04

PRELIMINARY OBJECTIONS TO DEFT'S AMENDED NEW MATTER AND COUNTER CLAIMS F/PAUL F BURROUGHS ESQ. W/CERT OF SERVICE.

006 Image page(s) exist(s) for this entry

7/09/04

PLFF T.E. KALKHOF REALTY COMPANY'S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO DEFT'S AMENDED NEW MATTER AND COUNTERCLAIMS F/PAUL F BURROUGHS ESQ. W/CERT OF SERVICE.

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7/12/04 DEFAULT NOTICE RE: PA RCP 237.1 ADDRESSED TO PAUL BURROUGHS, ESQ.
2222 WEST GRANDVIEW BLVD, ERIE 16506 DTD 7/8/04. F/DEANNA LYNN
SARACCO, ESQ.

001 Image page(s) exist(s) for this entry

7/22/04 CASE MANAGEMENT ORDER DTD 7/20/04; DISCOVERY SHALL BE COMPLETED
BY 3/20/05; PLFF'S PRE-TRIAL STATEMENT FILED BY 4/20/05; DEFT'S
PRE-TRIAL STATEMENT FILED BY 5/20/05; RECOMMENDED TRIAL TERM IS
JUNE 2005 TERM OF COURT & COUNSEL SHALL CERTIFY THE CASE FOR
TRIAL; ALL DEPOSITIONS FOR USE AT TRIAL SHALL BE COMPLETED ONE WEEK
PRIOR TO RECOMMENDED TRIAL TERM; ALL MOTIONS IN LIMINE SHALL BE
FILED ONE WEEK PRIOR TO RECOMMENDED TRIAL TERM; ALL TIME PERIODS
SHALL BE STRICTLY FOLLOWED UNLESS MODIFIED BY ORDER OF COURT;
PLFF SHALL SERVE A COPY OF THIS ORDER UPON ALL PARTIES PER PA RCP
440 S/ANTHONY, JUDGE. NOTICE GIVEN EACH PARTY/COUNSEL OF RECORD

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8/02/04 ORDER DTD 8/2/04 ORAL ARGUMENT ON THE PLTF'S PRELIMINARY OBJECTIONS
IS SCHEDULED FOR 8/31/04 @ 11:00 AM BEFORE THE UNDERSIGNED.
S/WILLIAM R CUNNINGHAM, JUDGE. NOTICE GIVEN.

001 Image page(s) exist(s) for this entry

8/02/04 DEFT'S BRIEF IN OPPOSITION TO PLTF'S PRELIMINARY OBJECTIONS
F/DEANNA LYNN SARACCO W/CERTIFICATE OF SERVICE.

008 Image page(s) exist(s) for this entry

8/18/04 PRAECIPE FOR APPEARANCE ON BEHALF OF DFDNT LINDA BEBKO-JONES W/
CERT OF SERVICE. F/ANTHONY ANDREZESKI, ESQ.

001 Image page(s) exist(s) for this entry

9/01/04 ORDER DTD 8/31/04, AFTER ORAL ARGUMENT, PLTF'S PRELIMINARY

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OBJECTIONS TO DFDNTS' AMENDED NEW MATTER AND COUNTERCLAIMS ARE
OVERRULED EXCEPT PLTF SHALL REPLEAD PARAGRAPHS 184, 186 & 187 TO
AVER THE TIME, PLACE AND ITEMS OF SPECIAL DAMAGES. S/JUDGE
CUNNINGHAM. NOTICE GIVEN.

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10/01/04

NOTICE OF SERVICE OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF
DOCUMENTS; SERVED UPON DEANNA LYNN SARACCO ESQ BY US FIRST CLASS
MAIL TO 76 GREENMONT DR ENOLA PA 17025 ON 10/01/04 F/PAUL F
BURROUGHS ESQ W/CERT OF SRVC

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10/06/04

OBJECTIONS TO NOTICE OF DEPOSITION F/PAUL F BURROUGHS, ESQ. W/CERT
OF SERVICE.

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10/07/04 PLTF'S RESPONSE TO DEFTS' AMENDED NEW MATTER AND COUNTERCLAIMS

F/PAUL F BURROUGHS, ESQ. W/CERTIFICATE OF SERVICE.

014 Image page(s) exist(s) for this entry

10/15/04 NOTICE OF SERVICE OF RESPONSES TO DEFTS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS S/PAUL F BURROUGHS, ESQ. W/CERTIFICATE OF SERVICE
002 Image page(s) exist(s) for this entry10/26/04 PRAECIPE FOR APPEARANCE ON BEHALF OF DEFT WITH RESPECT TO THE CLAIMS ASSERTED AGAINST HER IN THE PLTF'S COMPLAINT. ATTORNEY DEANNA LYNN SARACCO AND ANTHONY ANDREZESKI CONTINUE TO REPRESENT THE DEFT WITH RESPECT TO THE CLAIMS ASSERTED IN THE DEFT'S COUNTERCLAIMS. S/CRAIG MURPHEY, ESQ. W/CERTIFICATE OF SERVICE.
001 Image page(s) exist(s) for this entry10/28/04 NOTICE OF SERVICE OF ANSWERS TO INTERROGATORIES UPON DEFT'S COUNSEL**Select Date To View Images**

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DEANNA LYNN SARACCO, ESQ., WHICH ANSWERS WERE FAXED AND U.S. FIRST CLASS MAIL POSTAGE PRE-PAID TO SAID ATTY'S OFFICE @ 76 GREENMONT DRIVE, ENOLA, PA 17025 ON 10/27/04. S/PAUL F BURROUGHS, ESQ. W/CERTIFICATE OF SERVICE.

002 Image page(s) exist(s) for this entry

10/29/04

NOTICE OF SERVICE OF RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS (THIRD REQUEST) UPON DEFT'S COUNSEL DEANNA LYNN SARACCO, ESQ. BY FACSIMILE AND U.S. FIRST CLASS MAIL POSTAGE PREPAID @ 76 GREENMONT DRIVE ENOLA PA 17025 ON 10/28/04. S/PAUL F BURROUGHS, ESQ. W/CERTIFICATE OF SERVICE.

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1/11/05

NOTICE OF SERVICE OF SUPPLEMENTAL ANSWER TO DEFTS INTERROGATORIES (FIRST SET) SERVED UPON DEANNA LYNN SARACCO ESQ 76 GREENMONT DR ENOLA PA 17025 & DALE E HUNTLEY ESQ 100 STATE ST SUITE 700 ERIE PA

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16507 BY FACSIMILE, AND TO ANTHONY ANDREZESKI ESQ PO BOX CAMP HILL
PA 17007-0520 BY 1ST CLASS MAIL, ON 01/08/04 F/PAUL F BURROUGHS ESQ
W/CERT OF SRVC

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1/14/05 CERTIFICATE PREREQUISITE TO SERVICE OF A SUBPOENA PER RULE 4009.22
TO: MOTORISTS MUTUAL INSURANCE CO 471 E BROAD ST COLUMBUS OH 43215-
3861, A & B INSULATION CO NORTH 564 FLORENCE ST RIDGWAY PA 15853,
LALPMAN CLAIM SERVICE PO BOX 828 EDINBORO PA 16412, BARNHART
BUILDERS INC 5201 HARBORGREEN RD ERIE PA 16510 F/DALE HUNTLEY ESQ
W/CERT OF SRVC

009 Image page(s) exist(s) for this entry

2/07/05 CERTIFICATE PREREQUISITE TO SERVICE OF A SUBPOENA PER RULE 4009.22
UPON FREE-COL LABORATORIES S/DALE HUNTLEY, ESQ. W/CERTIFICATE OF
SERVICE.

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2/08/05 CERTIFICATE PREREQUISITE TO SERVICE OF A SUBPOENA PER RULE 4009.22
UPON MICROBAC LABORATORIES INC S/PAUL F BURROUGHS, ESQ.

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3/07/05 JOINT MOTION TO EXTEND DISCOVERY/CASE MANAGEMENT ORDER S/DEANNA
LYNN SARACCO, ESQ., DALE HUNTLEY, ESQ. AND PAUL B BURROUGHS, ESQ.
W/CERTIFICATE OF SERVICE.

004 Image page(s) exist(s) for this entry

3/08/05 NOTICE OF INTENT TO SERVE A SUBPOENA TO PRODUCE DOCUMENTS AND
THINGS FOR DISCOVERY PURSUANT TO RULE 4009.21 TO ENTERPRISE RENT A
CAR 1524 FRENCH ST ERIE PA 16501 F/PAUL F BURROUGHS ESQ W/CERT OF
SRVC

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3/08/05 AMENDED CASE MANAGEMENT ORDER DTD 03/07/05 1. DISCOVERY BY 05/01/05
2. PLFF'S PRETRIAL STMT BY 05/30/05 3. DEFT'S PRETRIAL STMT BY
06/15/05 4. RECOMMENDED TRIAL TERM IS AUG 2005 TERM OF COURT AND
COUNSEL SHALL CERTIFY CASE FOR TRIAL 5. ALL DEPOSITIONS FOR USE AT
TRIAL SHALL BE COMPLETED (1) WK PRIOR TO THE RECOMMENDED TRIAL TERM
6. ALL MOTIONS IN LIMINE SHALL BE FILED (1) WK PRIOR TO RECOMMENDED
TRIAL TERM 7. ALL TIME PERIODS SHALL BE STRICTLY FOLLOWED UNLESS
MODIFIED BY ORDER OF COURT S/WILLIAM R CUNNINGHAM JUDGE
NOTICE GIVEN

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3/29/05 CERTIFICATE PREREQUISITE TO SERVICE OF A SUBPOENA PER RULE 4009.22
UPON ENTERPRISE RENT A CAR S/PAUL F BURROUGHS, ESQ. W/CERTIFICATE
OF SERVICE.

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4/15/05 PRAECIPE FOR APPEARANCE ON BEHALF OF DEFENDANT, LINDA BEBKO-JONES AND COMMONWEALTH OF PENNSYLVANIA W/CERT OF SERVICE. F/RICHARD VENDETTI, ESQ.

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4/28/05 PRAECIPE TO WITHDRAW APPEARANCE OF COUNSEL F/DEANNA LYNN SARACCO ESQ W/CERT OF SRVC

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5/04/05 AMENDED CASE MANAGEMENT ORDER DTD 05/04/05 1. DISCOVERY BY 07/01/05 2. PLFF'S PRETRIAL STMT BY 07/30/05 3. DEFT'S PRETRIAL STMT BY 08/15/05 4. RECOMMENDED TRIAL TERM IS OCT 2005 TERM OF COURT AND COUNSEL SHALL CERTIFY CASE FOR TRIAL 5. ALL DEPOSITIONS FOR USE AT TRIAL SHALL BE COMPLETED (1) WK PRIOR TO THE RECOMMENDED TRIAL TERM 6. ALL MOTIONS IN LIMINE SHALL BE FILED (1) WK PRIOR TO RECOMMENDED

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TRIAL TERM 7. ALL TIME PERIODS SHALL BE STRICTLY FOLLOWED UNLESS MODIFIED BY ORDER OF COURT. S/WILLIAM R CUNNINGHAM, JUDGE. W/CONSENT TO CASE MANAGEMENT ORDER S/PAUL BURROUGHS ESQ; RICHARD A VENDETTI ESQ; AND DALE HUNTLEY, ESQ.

002 Image page(s) exist(s) for this entry

5/16/05

NOTICE OF SERVICE OF SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS UPON DEFTS THROUGH THEIR COUNSEL OF RECORD WHICH SUPPLEMENTAL RESPONSE WAS SERVED BY HAND DELIVERY OR US FIRST CLASS MAIL POSTAGE PREPAID ON 5/13/05. S/PAUL F BURROUGHS, ESQ. W/CERT OF SERVICE.

002 Image page(s) exist(s) for this entry

6/13/05

NOTICE OF SERVICE OF SECOND SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS UPON DEFTS BY HAND DELIVERING SAME TO THEIR COUNSEL RICHARD A VENDETTI, ESQ. 3820 LIBERTY STREET

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ERIE PA AND DALE E HUNTLEY, ESQ. 100 STATE STREET SUITE 700 ERIE PA
ON 6/13/05. S/PAUL F BURROUGHS, ESQ. W/CERTIFICATE OF SERVICE.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer and Affirmative Defenses to Plaintiff's Complaint was served upon the following counsel for plaintiff Motorists Mutual Insurance Company, via First-Class United States Mail, this 25th day of July 2005:

David J. Groth, Esq.
Cozen O' Connor
1900 Market Street
Philadelphia, PA 19103-3508

s/ Dale Huntley
Dale Huntley